

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

KEVIN LEE ESTES,

Plaintiff,

vs.

DEPARTMENT OF
CORRECTIONS, COYOTE
RIDGE CORRECTIONS
CENTER, HEARINGS OFFICER
SCANTLIN, LT. H.C. PENROSE,
SGT. S KULM, CAPT. R.
THOMPSON, CAPT. S. MURPHY
and C/O NICHOLAS A. LEAVITT,

Defendants.

NO. CV-12-5058-JPH

REPORT AND RECOMMENDATION TO
STRIKE HABEAS PETITION AND TO
DENY REQUEST FOR CERTIFICATE
OF APPEALABILITY

By Order filed June 11, 2012, the Court directed Mr. Estes to amend or voluntarily dismiss his civil rights complaint in this action. ECF No. 13. Plaintiff, a prisoner at the Coyote Ridge Corrections Center is proceeding *pro se* and *in forma pauperis*; Defendants have not been served. Plaintiff failed to allege facts showing identified Defendants caused actual injury to his access to the court concerning a direct criminal appeal, a habeas petition, or a civil rights action regarding the conditions of his confinement. *See Lewis v. Casey*, 518 U.S. 343, 351 (1996). That same day, Mr. Estes filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 in this action. ECF No. 14.

The Court will not permit Mr. Estes to maintain both a civil rights action and a federal habeas action in the same case. Habeas actions have different filing fee

REPORT AND RECOMMENDATION TO STRIKE HABEAS PETITION AND TO
DENY REQUEST FOR CERTIFICATE OF APPEALABILITY -- 1

1 requirements and monetary damages are not an available remedy for one pursuing a writ
2 of habeas corpus. Furthermore, a challenge to Mr. Estes' underlying conviction from
3 2006 has no bearing on a possible claim that he was denied access to the court in 2012.
4 *See Brown v. Vasquez*, 952 F.2d 1164, 1169 (9th Cir.1991) (although civil in nature,
5 habeas corpus is "dramatically different from any other type of civil action").

6 To the extent Mr. Estes wishes to challenge his Pierce County conviction, or to
7 challenge the fact or duration of his confinement, he must do so in a separate habeas
8 action after he has exhausted his available state court remedies. *See Preiser v. Rodriguez*,
9 411 U.S. 475, 487-90 (1973). The appropriate venue in which to file a habeas petition is
10 in the District in which the conviction arose. At this time, **IT IS RECOMMENDED** the
11 habeas petition, ECF No. 14, be **STRICKEN** and Plaintiff's Request for a Certificate of
12 Appealability, ECF No. 19, be **DENIED as moot**.

13 **OBJECTIONS**

14 Any party may object to a magistrate judge's proposed findings, recommendations
15 or report within fourteen (14) days following service with a copy thereof. Such party
16 shall file written objections with the Clerk of the Court and serve objections on all
17 parties, specifically identifying the portions to which objection is being made, and the
18 basis therefor. Any response to the objection shall be filed within fourteen (14) days after
19 receipt of the objection. Attention is directed to FED. R. CIV. P. 6(e), which adds
20 additional time after certain kinds of service.

21 A district judge will make a de novo determination of those portions to which
22 objection is made and may accept, reject, or modify the magistrate judge's determination.
23 The judge need not conduct a new hearing or hear arguments and may consider the
24 magistrate judge's record and make an independent determination thereon. The judge
25 may, but is not required to, accept or consider additional evidence, or may recommit the
26 matter to the magistrate judge with instructions. *United States v. Howell*, 231 F.3d 615,
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1 621 (9th Cir. 2000); 28 U.S.C. § 636(b)(1)(B) and (C), FED. R. CIV. P. 72; LMR 4, Local
2 Rules for the Eastern District of Washington.

3 A magistrate judge's recommendation cannot be appealed to a court of appeals;
4 only the district judge's order or judgment can be appealed.

5 **IT IS SO RECOMMENDED.** The District Court Executive is directed to enter
6 this Report and Recommendation, forward a copy to Plaintiff, and SET A CASE
7 MANAGEMENT DEADLINE ACCORDINGLY.

8 **DATED** this 20th day of June, 2012.

9
10 S/ James P. Hutton
11 JAMES P. HUTTON
12 UNITED STATES MAGISTRATE JUDGE
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